The Honorable Ricardo Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

REALNETWORKS, INC., a Washington corporation, Plaintiff, vs. MLB ADVANCED MEDIA, L.P., a Delaware limited partnership Defendant.	No. CV04-0511FDB DEFENDANT'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS COUNTERCLAIMS AND MOTION TO DISMISS PLAINTIFF'S CLAIMS **NOTE ON MOTION CALENDAR: September 10, 2004**

INTRODUCTION

This litigation should appropriately end here. Plaintiff RealNetworks, Inc. ("RealNetworks") has not responded within the allotted time to the Motion to Dismiss Counterclaims and Motion to Dismiss Plaintiff's Claims filed by defendant MLB Advanced Media, L.P. ("MLBAM") on August 19, 2004. Because RealNetworks has not opposed MLBAM's motions to dismiss, MLBAM requests that this Court grant the motions in their entirety and dismiss this action.

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ARGUMENT

MLBAM filed its motions to dismiss on Thursday, August 19, 2004. In these dispositive motions, MLBAM moved for an order of the Court (*i*) granting voluntary dismissal of MLBAM's counterclaims without prejudice under FRCP 41(a)(2) and (c); and (*ii*) dismissing RealNetworks' claims on two grounds: lack of subject matter jurisdiction (due to lack of diversity and lack of a federal question) and failure to state a claim upon which relief may be granted (due to RealNetworks' inability to show damages).

Pursuant to Local Rule CR 7(d)(3), MLBAM's motions were noted for consideration on September 10, 2004, *i.e.*, the fourth Friday after filing and service. Local Rule CR 7(d)(3) provides that any opposition to the motions "shall be filed and served not later than the Monday before the noting date." *Id.* Because Labor Day fell on the Monday before the noting date, RealNetworks' deadline for filing any opposition may have been Tuesday, September 7, 2004. Either way, that deadline has come and gone, and RealNetworks has failed to respond to MLBAM's motions to dismiss.

RealNetworks' failure to file an opposition in compliance with the local rules is a sufficient basis in and of itself to grant MLBAM's motions to dismiss. *See Adams v. Kincheloe*, 743 F. Supp. 1393, 1396 (E.D. Wash. 1990) (finding that plaintiff's failure to comply with the local rules by failing to file opposition to defendant's summary judgment motion was a sufficient basis to grant defendant's motion). Moreover, Local Rule CR 7(b)(2) explicitly states that a failure to file any opposition to a motion "may be considered by the court as an admission that the motion has merit." *Id.* The Court should thus consider RealNetworks' failure to file any opposition as an admission that MLBAM's motions to dismiss have merit, and, in turn, grant the motions in their entirety. *See In re Metawave Comm. Corp. Sec. Lit.*, 298 F. Supp.2d 1056, 1090 (W.D. Wash. 2003) (interpreting plaintiff's failure to address an issue as a concession that the argument constituted a valid reason for dismissal of the claim); *see also Chourre v. I.R.S.*, 203 F.

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Supp.2d 1196, 1202 (W.D. Wash. 2002) (granting defendant's summary judgment motion pursuant to Local Rule CR 7(b)(2) on the grounds that plaintiff's failure to file opposition to defendant's motion was deemed to be an admission that the motion had merit).

RealNetworks' failure to oppose MLBAM's motions to dismiss signals the futility of pursuing this action in federal court. To date, both parties have incurred significant legal fees and other expenses over largely resolved issues. Indeed, in an effort to avoid additional expenses and distraction, the parties stipulated on August 20, 2004, to stay discovery and all motions related to discovery until September 15, 2004. The stay – which the Court ordered on August 26, 2004 – applied only to discovery and motions related to discovery. By its terms as well as its intent, the stay does not apply to the dispositive motions to dismiss at issue here.

If this litigation proceeds beyond the expiration of the stay of discovery, MLBAM and RealNetworks may unnecessarily continue to incur further costs for litigation that already has extended beyond its due course and should be summarily dismissed. Given the prospect of needless expenses, legal fees and continued business distraction to both parties, and especially given that RealNetworks did not oppose MLBAM's motions to dismiss, it seems sensible and appropriate that MLBAM's dispositive motions be considered prior to the recommencement of discovery. Accordingly, MLBAM respectfully requests the Court to resolve MLBAM's motions to dismiss at its earliest convenience, and preferably before the expiration of the stay order on September 15, 2004.

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DATED this 9th day of September, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2004, I electronically filed DEFENDANT'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS COUNTERCLAIMS AND MOTION TO DISMISS PLAINTIFF'S CLAIMS with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following individuals. I hereby certify that I also caused said documents to be delivered to the following individuals in the manner indicated:

Ralph H. Palumbo, Esq. Lynn M. Engel, Esq. Denise L. Ashbaugh, Esq. Summit Law Group 315 Fifth Avenue South Suite 1000 Seattle, WA 98104-2682 Phone: (206) 676-7000 Fax: (206) 676-7001	☑ U.S. Mail, Postage Prepaid ☐ Hand Delivered ☐ Overnight Mail via Federal Express ☑ Facsimile Transmission ☑ ECF Filing - E-mail Transmission

DATED this 9th day of September, 2004.

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